INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1113

OTTO HERMANN WILHELM MACKE, THERESA JOHANNA MULLER AND IRMGARD STURN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 553–555) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 7, 1947 (R. 555). The petition for a writ of certiorari was filed March 10, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the defense that prosecution of the petitioners was barred by the statute of limitations is open to them in this Court, no plea or defense to that effect having been interposed below; and, in any event, whether the general three-year statute of limitations is applicable to the offense charged in the indictment.

2. Whether the trial court's instructions to the jury were deficient in failing to distinguish between the Government's direct proof of a conspiracy and the proof adduced through pre-trial admissions and cross-examination of petitioners.

STATUTES AND REGULATIONS INVOLVED

The conspiracy statute (Section 37 of the Criminal Code; 18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The pertinent provisions of the Alien Registration Act, 1940 (Act of June 28, 1940, c. 439,

Title III, 54 Stat. 670, 673–676; 8 U. S. C. 451–460), are:

SEC. 31. (a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 30 [registration of aliens seeking visas to enter the United States], and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.

* * * * *

SEC. 33. (a) All applications for registration and fingerprinting under section 31 shall be made at post offices or such other places as may be designated by the Commissioner [of Immigration and Naturalization].

* * * * *

SEC. 34. (a) The Commissioner is authorized and directed to prepare forms for the registration and fingerprinting of aliens under this title. Such forms shall contain inquiries with respect to (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General.

SEC. 36. * * *

(c) Any alien * * * who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; * * *.

Section 1044 of the Revised Statutes as amended by the Act of December 27, 1927, c. 6, 45 Stat. 51 (18 U. S. C. 582), provides:

SEC. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046 [18 U. S. C 584], unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: * * *

Section 1 of the Act of August 24, 1942, 56 Stat. 747, as amended by section 19 (b) of the Act of July 1, 1944, 58 Stat. 649, 667 (18 U. S. C., Supp. V, 590a), provides:

The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or

other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

The pertinent portions of the regulations governing the registration of aliens, issued by the Commissioner of Immigration and Naturalization on August 8, 1940, with the approval of the Attorney General (5 F. R. 2836–2841) read as follows:

§ 29.3 (a) Registration shall commence on August 27, 1940. Any person in the United States on that date who is required to register and be fingerprinted, or to register, may do so at any time on or before December 26, 1940.

* * * * *

§ 29.4 (l) (10) The alien, if fourteen years of age or older, shall state any activities in addition to his occupation in which he is, has been within the past five years, or intends to be engaged. The alien shall

list the names of all clubs, lodges, groups, organizations, or societies to which he belongs or in which he participates. If the alien holds any office or official position in any of these clubs, lodges, groups, organizations, or societies, he shall so state.

* * * * *

§ 29.4 (l) (15) The alien, if fourteen years of age or older, shall state whether, during the past five years, he has been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government. If the alien has been affiliated with or active in any such groups or organizations, he shall list them. If he holds an office or official position in any such group or organization, he shall so state. The registration officer shall not undertake to enumerate or define any such group or organization, he shall so state. The registration officer shall not undertake to enumerate or define any such groups or organizations.

STATEMENT

An indictment in one count was returned against petitioners and 105 others in the United States District Court for the Eastern District of New York on August 2, 1944, charging them with conspiracy to defraud the United States, in violation of Section 37 of the Criminal Code, *supra*, p. 2 (R. 4–18).

The gist of the allegations of the indictment and the nature of the proof adduced by the Government were, as petitioners assert (Pet. 4, 7), substantially the same as in *Fiswick et al.* v. *United States,* No. 51, O. T. 1946, decided December 9, 1946. See pp. 6–14 of the brief for the United States in that case.[1] The indictment charged that the defendants had conspired with certain German consular officials to conceal the defendants' affiliation with and activities in the Nazi party in the United States, and to defraud the United States of its lawful governmental function of securing such information when the defendants registered in 1940 under the Alien Registration Act (R. 11–15).

Government witnesses testified as to the activities of the Nazi party in the United States sponsored and directed by German consular officials here (R. 38–89, 134–154), the recruitment of members and the collection of dues (R. 41–58), and the festivities and meetings held under the auspices of the German consulate (R. 70, 80, 139–149, 194–197, 207–209). The Government's evidence further showed that petitioners' names were

[1] This was petitioners' second trial on the same indictment. In *United States* v. *Ausmeier et al.*, 152 F. 2d 349, the convictions of petitioners and 14 others named in the indictment were reversed because of errors in the instructions to the jury, which were not repeated here (see R. 525–526). Thereafter, when the case was called for retrial, the other defendants pleaded guilty (R. 35–36) and only petitioners went to trial.

on the Consulate's list of party members, that they paid dues regularly and that they had been sent invitations to Party festivities in this country (R. 67, 70–72, 75, 230, 353, 357–358). It was also shown that after the enactment of the Alien Registration Act of 1940 consular officials sent letters to all persons on the list of party members, including petitioners, requesting them to come to the consulate (R. 70–72, 74–75). These members came to the consulate in groups (R. 82–83, 152, 153), and were there given specific instructions as to the form of the answers to be given in response to certain questions in the alien registration form (R. 83–87, 152). As in the *Fiswick* case, petitioners' responses in their respective registration forms followed the instructions that had been given by the consular officials (R. 358–359). In response to Item 15 of the form, requiring information as to any affiliation of the registrant, within the preceding five years, with organizations devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government, each of the petitioners wrote (Macke, R. 378, 428; Muller, R. 474, 478; Sturn, R. 501–502):

> I am a non-resident member of the National Socialist German Workers Party in Germany [giving the date 1936 or 1937]. * * * No activities in the United States.

The Government also introduced as against petitioners individually (R. 362; see *infra*, p. 14)

admissions each had made to the F. B. I. prior to his trial, which, in substance, corroborated the foregoing evidence (Macke, R. 237–240, 269–270, 282–289; Muller, R. 296–305, 309–313; Sturn, R. 320–322, 324–326, 328–329, 331–334). Thus, the Government's case in chief was substantially the same as in *Fiswick*. However, on the cross-examination of petitioners, who took the stand in their own defense, certain additional evidence was adduced which was not present in the *Fiswick* case. For example, petitioners testified that they had joined the Nazi party in the United States and were members during the period covered by their answers in their registration forms (Macke, R. 407, 411–412, 426; Muller, R. 472–473; Sturn, R. 502); that they paid dues (Macke, R. 426; Muller, R. 473, 474; Sturn, R. 501) and attended party functions (Macke, R. 416–417, 419–421, 424–425; Muller, R. 473, 474; Sturn, R. 497–499); and, in effect, that their responses to Item 15 of the registration form were false (Macke, R. 414–415, 424, 429; Muller, R. 478; Sturn, R. 502). Moreover, Macke testified that, acting under instructions the German consular officials had given him in 1941, he destroyed his party book and pins (R. 418), and Muller testified that she received a slip of paper from the consular officials instructing her how to answer Item 15 of the registration form which she used and then destroyed after filling out the form (R. 476–477; cf. Sturn at R. 502).

Petitioners were found guilty by the jury (R. 3, 530), and were sentenced as follows: Macke, to imprisonment for three months; Muller, to imprisonment for six months; and Sturn, to imprisonment for 30 days (R. 3, 539–544). On appeal to the Circuit Court of Appeals for the Second Circuit, the convictions were affirmed (R. 555).

ARGUMENT

1. Petitioners' first contention (Pet. 10–11) is that the prosecution was barred by the three-year statute of limitations (18 U. S. C. 582, *supra*, p. 4). As petitioners concede, no such plea for defense was raised in the trial court (Pet. 8), and it does not appear that the contention was raised in the court below (see R. 546, 548, 550, 553–555). Consequently, the asserted bar of limitations cannot be advanced here. It is settled that if any matter of defense or other matter which might operate to bar or abate prosecution is not raised in the trial court, it may not thereafter be raised for the first time on appeal or otherwise.[2] And

[2] See, e. g., *Miller* v. *United States*, 41 App. D. C. 52, certiorari denied, 231 U. S. 755 (former jeopardy); *Brady* v. *United States*, 24 F. 2d 399, 405 (C. C. A. 8) (same); *United States* v. *Ginsburg*, 96 F. 2d 882, 885–886 (C. C. A. 7), certiorari denied, 305 U. S. 620 (entrapment); *United States* v. *Kaiser*, 138 F. 2d 219 (C. C. A. 7), certiorari denied, 320 U. S. 801 (same); *Powers* v. *United States*, 223 U. S. 303, 312 (objections to method of summoning or empaneling grand jury); *Burchett* v. *United States*, 194 Fed. 821, 825 (C. C. A. 4) (same); *Hagner* v. *United States*, 54 F. 2d 446,

this rule precludes belated assertions of the applicability of the statute of limitations. *Forthoffer* v. *Swope*, 103 F. 2d 707, 709 (C. C. A. 9); *Capone* v. *Aderhold*, 65 F. 2d 130, 131 (C. C. A. 5); *Pruett* v. *United States*, 3 F. 2d 353, 354 (C. C. A. 9).

In any event, the prosecution was not barred by the statute of limitations. It is conceded that, as petitioners assert (Pet. 10), the conspiracy charged in the indictment must be deemed to have terminated upon the filing of the alien registration forms in 1940 (see *Fiswick* v. *United States*, *supra*, slip opinion, pp. 4–5).[3] However, we disagree with petitioners' conclusion that the three-year statute of limitations (18 U. S. C. 582, *supra*, p. 4) applies rather than the broader period of limitation provided by special wartime legislation (18 U. S. C., Supp. V, 590a, *supra*, pp. 4–5). Petitioners' conclusion is predicated on the assertions that since the Alien Registration Act of 1940 provided no penalty for defrauding the United States by filing a false registration

---

447–449 (App. D. C.), affirmed on other grounds, 285 U. S. 427 (venue); *Gowling* v. *United States*, 64 F. 2d 796, 798 (C. C. A. 6) (same); *United States* v. *Zeuli*, 137 F. 2d 845, 847 (C. C. A. 2) (same); *Jackson* v. *United States*, 72 F. 2d 764, 765 (C. C. A. 3) (defense that defendant charged with embezzlement as custodian of bankrupt estate was not the custodian).

[3] The signing of such forms was the only overt act alleged as to petitioners (R. 16, 17). Other overt acts alleged to have been committed by other defendants in 1942 (R. 17–18) were not relied upon or established at the trial.

statement, it would have been sufficient to plead and prove a conspiracy wilfully to file a false registration statement, and that, therefore, the allegations as to defrauding the United States, upon which the applicability of the special extension act depends, were mere surplusage. The fallacy of this reasoning is that it misconceives the gist of the offense charged in the indictment. Petitioners were not charged with substantive violations of or a conspiracy to violate the Alien Registration Act. Had they been so charged, we concede that the averments as to defrauding the Government would not have been required or warranted and could not, therefore, have brought the case within the broader statute of limitations which is applicable only to offenses involving defrauding or attempt to defraud the United States." See *United States* v. *Scharton,* 285 U. S. 518, cited by petitioners, which held to that effect with respect to an indictment under the Revenue Act of 1926 for wilfully attempting to evade taxes. Here, petitioners were indicted under the second part of the conspiracy statute (18 U. S. C. 88, *supra,* p. 2), which proscribes any conspiracy "to defraud the United States in any manner or for any purpose." The defrauding of the Government in the exercise of its lawful functions (cf. *Haas* v. *Henkel,* 216 U. S. 462, 479–480) was the gist of the offense charged. Consequently, the case falls squarely within the class

of offenses with respect to which the special wartime statute suspended the running of the statute of limitations. Cf. *Miller* v. *United States*, 24 F. 2d 353, 360–361 (C. C. A. 2), certiorari denied, 276 U. S. 638, in which the Second Circuit distinguished this Court's decision in *United States* v. *Noveck*, 271 U. S. 201, the forerunner of *United States* v. *Scharton*, *supra*, on parallel reasoning. See also H. Rep. 2051 and S. Rep. 1544, 77th Cong., 2d sess.; *Fiswick* v. *United States*, *supra*, slip opinion, p. 4 and note 5.

2. Petitioners' second contention (Pet. 11–13) is that the trial court erred in its instructions to the jury in that it—

> made no distinction whatsoever between the evidence that had been produced by the government in an effort to prove the existence of a conspiracy and the various exhibits on which the names of the petitioners appeared [the pre-trial statements] as well as their testimony on the stand. It only charged (R. p. 526) "if, on the other hand you believe that the evidence adduced by the government convinces you of the existence of a conspiracy in the filing of a false registration known to contain false and material matter by these defendants, then your verdict must be guilty." [Pet. 12.]

While the petition is not entirely clear, we believe it in effect asserts that the quoted instruction was erroneous in two respects: first, it inferentially permitted the jury to consider the pre-trial state-

ments of each petitioner against the others; and, second, it failed to point out that there was a difference in the probative significance of the Government's evidence in chief directed to the proof of the petitioners' conspiratorial relations and evidence having the same effect adduced on cross-examination of the petitioners. Neither contention appears to have been made in the court below (see R. 546, 548, 550, 553–555).

In respect of the first proposition, petitioners urge that this case is not substantially different from *Fiswick*. However, in that case, as this Court noted (slip opinion, pp. 6–8), the defendants' pre-trial admissions constituted the only direct evidence establishing their conspiratorial relations with the consular officials and among themselves. In that particular setting, it was deemed prejudicial for the trial judge to have given the jury the concededly erroneous instruction that the pre-trial admissions of each defendant were admissible against all. The instant case is far different. As petitioners concede (Pet. 11), when the pre-trial statements were finally admitted in evidence at the close of the Government's case, the trial judge properly admonished the jury that they were to be considered only against the particular petitioner to which they related (R. 362). This affirmative cautionary instruction was never retracted or altered. And we submit that petitioners' assertion that the general charge on conspiracy inferentially permitted the

jury to conclude otherwise is without foundation, particularly since the record does not show that the court was requested to re-instruct the jury on this point in the course of his final charge at the close of all the evidence (see R. 526–529). Moreover, there was direct evidence apart from the pre-trial statements that petitioners had gone to the consulate and there received instructions as to the answers to be given in their registrations. Petitioner Muller made such an admission on cross-examination. See p. 9, *supra*. That testimony was, of course, admissible against all of the petitioners. See *Radin* v. *United States*, 189 Fed. 568, 576 (C. C. A. 2), certiorari denied, 220 U. S. 623.[4]

For similar reasons, petitioners' second proposition—that the trial judge should have instructed the jury to treat evidence as to the conspiracy obtained by cross-examination of petitioners differently from that offered by the Government in its case in chief—is without merit. No such

[4] The rule that pre-trial statements made by one defendant after the offense has been committed, or after the termination of the conspiracy, are not admissible against codefendants applies only where such statements are made out of the presence of the codefendants who thus have no opportunity to protest or question the statements. See *Brown* v. *United States*, 150 U. S. 93, 98–99; *Seeman* v. *United States*, 90 F. 2d 88, 90 (C. C. A. 5), certiorari denied, 305 U. S. 620; *Roma* v. *United States*, 53 F. 2d 1007, 1009 (C. C. A. 7); *Dowdy* v. *United States*, 46 F. 2d 417, 425 (C. C. A. 4); *Graham* v. *United States*, 15 F. 2d 740, 742–743 (C. C. A. 8), certiorari denied, 274 U. S. 743; *Johnson* v. *United States*, 5 F. 2d 471, 475 (C. C. A. 4), certiorari denied, 269 U. S. 574.

instruction was requested, nor would it have been proper. The testimony elicited from petitioner Muller on cross-examination was, as we have noted, admissible against all of the petitioners. That testimony, as well as other testimony elicited from petitioners which tended to reinforce the Government's case, had at least the same probative value as though it had come from other witnesses. Cf. *Freeman* v. *United States,* 96 F. 2d 13, 15 (C. C. A. 5), certiorari denied, 305 U. S. 596; *Radin* v. *United States,* 189 Fed. 568, 576 (C. C. A. 2), certiorari denied, 220 U. S. 623. If anything, Muller's testimony, being that of a defense witness, was binding upon the defense and of greater probative significance than similar testimony by a disinterested witness. Cf. *Cartello* v. *United States,* 93 F. 2d 412, 415 (C. C. A. 8).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

APRIL 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947